No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

PETITIONER,

V.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

MARVIN KRISLOV
JONATHAN ALGER
UNIVERSITY OF MICHIGAN
Office of the Vice President
and General Counsel
4010 Fleming Admin. Bldg.
503 Thompson St.
Ann Arbor, MI 48109

EVAN CAMINKER
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109

PHILIP J. KESSLER
LEONARD M. NIEHOFF
BUTZEL LONG
350 South Main, Suite 300
Ann Arbor, MI 48104

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

JOHN H. PICKERING
JOHN PAYTON
BRIGIDA BENITEZ
STUART DELERY
CRAIG GOLDBLATT
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, DC 20037

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied settled principles of *stare decisis* in determining that the University of Michigan Law School's admissions program is constitutional under this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

2. If this Court declines to give *stare decisis* effect to its decision in *Bakke*, whether the educational benefits that flow from a diverse student body to an institution of higher education, its students, and the public it serves, are sufficiently compelling to permit the school to consider race and/or ethnicity as one of many factors in making admissions decisions through a "properly devised" admissions program.

3. Whether the current admissions processes of the University of Michigan Law School represent such a "properly devised" admissions program.

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STATEMENT OF THE CASE

Factual Background

There is no genuine dispute in this case about the relevant historical facts, and the record evidence clearly establishes three central realities. First, academic selectivity and student body diversity, including racial diversity, are both integral to the educational mission of the University of Michigan Law School (the "Law School"). Second, the only way for the Law School to achieve meaningful racial diversity in its student body (while maintaining academic selectivity) is to take race into account in admissions. Third, the Law School's consideration of race in admissions is moderate in scope, treats all applicants as individuals, and does not employ quotas or set-asides (or their functional equivalent).

1. The Law School is among the nation's leading law schools. It has achieved that prominence by striving to produce highly skilled and effective lawyers who have been chosen and tutored to serve as leaders of the profession and of our Nation as a whole. JA 310, 319.[1] In pursuit of these goals, the Law School has determined that its mission requires "a curriculum that ... firmly links professional training to the opportunity for reflection about many of our most fundamental public questions, such as ... how the law can address questions of real social urgency," including "the effects of religious, racial and gender intolerance in our culture." JA 1658. It also requires a broadly diverse "mix of students with varying backgrounds and experiences who will respect and learn from each other," who are "among the most capable students applying to American law schools in a given year," and who have a "strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well being of others." JA 310.

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[1] "JA" citations refer to the Joint Appendix filed in the court of appeals.

The Law School's admissions policy, adopted by vote of the faculty in 1992, is carefully crafted to support those goals and (as the court of appeals recognized) to comply with this Court's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). Pet. App. 4a. The policy instructs the director of admissions, in consultation with the Law School faculty, to review every application file in its totality and make an individualized assessment of each applicant. The Law School pays careful attention to an applicant's undergraduate grades and LSAT score; these are useful (though imperfect) predictors of academic success in law school. But the purpose of the admissions process is not by any means to dole out rewards to those who earned the best grades or achieved the highest scores on a standardized test. Instead, "[t]he guiding purpose for selection among applicants is to make the School a better and livelier place in which to learn and to improve its service to the profession and the public." JA 1885.

To that end, the Law School's application form seeks a great deal of information about each applicant—including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and to the diversity of the Law School. The Law School gives serious consideration to "soft variables" and to each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment or characteristic—e.g., an unusual intellectual achievement, employment experience, non-academic performance, or personal background," JA 1525, because it believes that such matters "not only bear on the applicant's likely graded performance but also have the additional benefit that they may tell us something about the applicant's likely contributions to the intellectual and social life of the institution." JA 314.

The written policy relates several specific examples of applicants—none of whom was a member of a historically underrepresented minority group—for whom the Law School's concern for the broadest sense of diversity played a role in the decision to offer them admission. *See* JA 320-21. One had an LSAT score around the 50th percentile and a 2.67 GPA from Harvard, but was born in Bangladesh, received outstanding references from his professors and had an exceptional record of extracurricular activity. Another was an Argentine single mother who also had a lower LSAT score than most admitted applicants, but who graduated *summa cum laude* from the University of Cincinnati and was fluent in four languages. In each of these cases, the applicants were capable of succeeding academically and their personal experiences suggested that they would contribute to the life of the school in important ways.

Although the diversity sought by the Law School's admissions policy is much broader and more complex than race, the policy does make special mention of the Law School's belief that the presence of "meaningful numbers" (or a "critical mass") of "students from groups which have been historically discriminated against, like African Americans, Hispanics, and Native Americans," is essential to effective pursuit of its educational mission. JA 321.

The extensive (and unchallenged) educational and social science evidence in the record establishes that meaningful interaction among students of different racial backgrounds improves the quality of education at the Law School in many important ways. *See infra* pp. 18-20. It is obvious that *race matters* to a great many issues that the Law School considers central to its chosen pedagogical mission. It is equally obvious that "students from groups which have been historically discriminated against" have experiences that are integral to this mission, regardless of whether they are rich or poor or "victims" of discrimination. Through this diverse

student body, the Law School seeks to teach students of all races about the role of race in our society (JA 1658); how to "work more effectively and more sensitively" in a world that "is and will be multi-racial" (JA 2243); and to instill "mutual respect" and "sympathetic engagement with the experiences of other people that are basic to the mature and responsible practice of law" (JA 5106).[2] As Kent Syverud, a former professor at the Law School who is now the Dean of the Vanderbilt Law School, further explained, "racial diversity in the Socratic classroom strongly fosters the kind of thinking that the best lawyers need to be able to do." JA 5620. Although Dean Syverud was originally "skeptical that considering race as a factor in admissions had a positive impact on the educational experience of law students," he came to learn "that all law students receive an immeasurably better legal education, and become immeasurably better lawyers, in law schools and law school classes where the student body is racially heterogeneous." JA 5618.[3] Indeed, the educational benefits of diversity are not in dispute. Petitioner acknowledged that, "[n]o one is contesting that there are educational benefits of diversity. It's simply not an issue in the case." JA 7192.

2. The record in this case nevertheless demonstrated that racially homogeneous classrooms would become the

[2] The Law School's policy is not premised on the stereotyping notion that anyone's thoughts or perspectives are determined by his or her race. To the contrary, educators testified that the presence of a critical mass of minority students is essential to *dismantling* such stereotypes. When there are more than a token number of minority students, "everybody in the class starts looking at people as individuals in their views and experiences, instead of as races" and sees "that there is a diversity of views and experiences among the minority students" (JA 7697-99), just as there is among white students.

[3] This conclusion was derived from "the experience of teaching the same subject matter to classes that are racially homogeneous and racially heterogeneous" and to "classes where non-white students make up a tiny fraction . . . and where their numbers are more significant." JA 5618.

norm in leading law schools like the University of Michigan if race could no longer be considered as a factor in admissions. By way of example, a class of 401 students entering the Law School would have included a sum total of 16 African-American, Hispanic and Native-American students under such a regime. J.A. 6047.[4]

While the Law School engages in extensive recruiting and outreach activities targeted at minority applicants, such efforts have never proven sufficient to enroll a critical mass of minority students without the consideration of race in the admissions process. *See, e.g.*, JA 401, 7668-70. And the evidence also showed that no entirely race-blind admissions process (such as a "lottery" among applicants meeting minimal numerical credentials) could enroll a meaningful number of minority students. JA 7528-32; *see also infra* pp. 8-9 & n.8, 21-22.

3. The record also establishes that the "critical mass" sought by the Law School is not by any means a quota. As the chair of the committee that drafted the admissions policy testified at trial, the concept of critical mass is in many ways "the opposite of a quota." Rather than seeking some specific number of students of particular races, the Law School simply wants "enough students so that every minority student doesn't feel that . . . their race is being

[4] The Law School's statistical expert demonstrated that the educational benefits of diversity that depend upon interaction among students of different races simply cannot be achieved with so few minority enrollments. JA 6045-49. The odds of having at least three African-American students and three Hispanic students in each first-year section of 85 would fall from nearly 100% at present to 27% under a race-blind process. The odds of having such minimal racial diversity in each half-section would fall from 76% to 4%. And the odds of having it in each residential dormitory section would fall from 34% to 1%. From the perspective of an African-American student, the odds of being the *only* African-American in a first-year section would increase from near zero to 22%; in a half-section from 4% to 51%; and in a dormitory section from 18% to 69%. JA 6049.

evaluated every time they speak. We want enough students so that there are differences of opinion. . . . [T]here's no hard and fast number on what that is." JA 7522. The Law School officials who devised and administer the policy uniformly testified that they did not envision or employ any numerical target or range of targets. Pet. App. 26a. The data confirm that testimony. Between 1992 and 2000 (the last year for which such data are available in the record), the percentage of minority students enrolled varied from a low of 13.5% to a high of 20% (Pet. App. 30a), a range that is inconsistent with the operation of a fixed quota.

More importantly, enrolling a critical mass of minority students is merely one educational objective among many that the admissions process seeks to foster. That goal is constantly balanced and compromised in the face of competing admissions objectives, such as assembling a class that is broadly diverse in attributes other than race and that shows exceptional academic promise. JA 7521-26.

Petitioner has not challenged the Law School's proof that it cannot enroll a critical mass of minority students without considering race in admissions. Instead, she has argued that certain numerical disparities in college GPA and LSAT scores between admitted minority and majority students at the Law School are nonetheless too large to be tolerated. The admissions "grids" petitioner relies upon (Pet. 7-8), however, were generated by the plaintiff's statistician. The Law School uses nothing of the kind in its actual admissions process. JA 7289-90.[5] Nonetheless, a

[5] Petitioner's grids exclude Hispanics other than Mexican Americans from the data entirely, even though they are expressly included in the Law School's admission policy. The allegation that it is the Law School's policy to treat some Hispanic applicants differently than others in admissions is incorrect. Pet. 6 n.2. Law School witnesses testified that the 1992 policy embraces a special commitment to all Hispanics, as the plain language indicates. *See* JA 7263 (Munzel, director of admissions), 477 (Dean Lehman), 321 (policy refers to "Hispanics").

careful review of the Petitioner's year 2000 grid (Pet. 8) illustrates a number of important points.

First, an applicant's college GPA, LSAT score, and ethnic background all appear to have some influence on admissions, but even together those factors fail to explain the outcomes—either within or across racial categories. This can easily be seen by comparing white applicants to each other. A majority of the admitted white applicants in 2000 came from "cells" in which more than 30% of the total white applicants were rejected. And the same point can be made by comparing white to minority applicants. Seventy-one white applicants were admitted in 2000 with grades and test scores the same or worse than *minority* applicants who were rejected.[6] These observations do not suggest that race does not matter in the admissions process. The grids do demonstrate, however, that the Law School is considering race (as its admissions policy states) only in the context of a highly individualized review that gives serious consideration to many different factors, including non-numerical "diversity" factors that obviously make a significant difference for many white applicants as well.

Second, the data indicate that the "plus" given to minority students, while not insignificant, does not guarantee anyone admission on racial grounds, insulate any applicant from competition with every other applicant, suggest a two-track admissions process, or unduly burden other applicants. The Law School's consideration of race does not actually affect the outcome of the vast majority of the admissions decisions each year. Approximately two-thirds of the Law School's minority applicants are denied

[6] If the "other Hispanic" applicants strategically excluded from plaintiff's grid are reintegrated into the data, the number of white students admitted in preference to rejected minorities with equal or better "numbers" jumps to 223—or almost 2/3 of a typical entering class. *See* JA 5467.

admission each year, and in each of the years between 1995 and 2000 the Law School denied admission to a greater proportion of minority applicants than majority applicants. JA 6045, 7585. The median college GPA of admitted students in 2000 was 3.68 for white students and 3.4 for African American students—slightly less than the difference between an A- and a B+. JA 5446. The petition's observation that the grids show "substantial differences in admissions outcomes *at given selection indices*" for white and minority applicants (Pet. 9 (emphasis added)) reveals nothing helpful. It would be surprising indeed, in a regime in which race is given any weight in admissions, if minority applicants were not admitted at substantially higher rates than *otherwise similar* non-minority applicants.[7]

Finally, the grid graphically demonstrates why it is such a challenge for the Law School to enroll a critical mass of minority students in each entering class, and why none of the superficially "race neutral" alternatives has any chance of success. The pool of minority applicants is extremely small, and is simply overwhelmed by the raw numbers of white applicants at every level. Among the candidates at the top of the pool numerically (with "A" averages and LSAT scores over 170), there were 92 white applicants and only one minority applicant. More broadly, in the LSAT range (164+) from which more than 90% of the admitted white students are drawn, the Law School received only 35 minority applicants compared to 900 white applicants. Even if a race-blind lottery were conducted for every applicant with a GPA above 3.0 and an LSAT above 150 (50th percentile)—a tactic that the Law School would never employ because of its unacceptable impact on other educational goals—the percentage of African-American

[7] Expert testimony established that the average odds of admission for non-minority applicants would only have increased by approximately 4.4% if the Law School had not taken race into account. JA 6045.

students enrolled would almost certainly fall below 3%. JA 4043 & n.10, 5462, 5464.[8]

Opinions Below

1. The district court concluded that *Bakke* contains no binding holding concerning whether the educational value of diversity is a "compelling interest" under strict scrutiny, Pet. App. 241a, and that this Court's recent decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989), establish that "remedy[ing] carefully documented effects of past discrimination" is the only possible justification for race-conscious government action. Pet. App. 243a. The district court also held that, even if achieving the benefits of diversity were a compelling interest, the Law School's admissions policies are not "narrowly tailored" to that end. *Id.* at 246a-252a. Concluding that the Law School's admissions policy violates the Equal Protection Clause and Title VI, the court enjoined the Law School "from using applicants' race as a factor in its admissions decisions." *Id.* at 293a.

2. An *en banc* panel of the Sixth Circuit reversed. The court of appeals recognized that five Justices in *Bakke* explicitly endorsed the "Harvard plan" admissions policy discussed at length by Justice Powell and appended to his opinion. *Id.* at 17a-19a. It also examined the various opinions in *Bakke* through the interpretive lens provided by this Court in *Marks v. United States*, 430 U.S. 188 (1977), and concluded that Justice Powell's opinion stated the "narrowest grounds" articulated by any Justice concurring in the relevant judgment. *Id.* at 15a-16a. The Sixth Circuit therefore held that "Justice Powell's opinion constitutes

[8] Even those bleak results could not be achieved once it became known that the Law School was conducting such a lottery because the pool would immediately be flooded with applications from lower-scoring white students who do not currently apply.

Bakke's holding and provides the governing standard here." *Id.* at 16a.

The Sixth Circuit then examined the Law School's admissions policy in detail and concluded that it is "virtually indistinguishable from the Harvard plan Justice Powell approved in *Bakke*." *Id.* at 29a. The Sixth Circuit emphasized that the Law School considers race only in the context of an individualized review of each applicant's file, and that it "considers more than an applicant's race and ethnicity" when pursuing a diverse class. *Id.* at 26a-27a. It found that the Law School's policy "does not operate to insulate any prospective student from competition with any other applicants," and appropriately pays some attention to the numbers but does not "use quotas," "set aside or reserve seats for under-represented minority students," or "strive to admit a particular percentage of under-represented minority students." *Id.* at 25a-29a. And it held that the Law School is not operating the "functional equivalent" of an illegal quota system. *Id.* at 30a.

The Sixth Circuit also considered a number of additional narrow tailoring factors drawn from this Court's opinions in *Croson* and *United States v. Paradise*, 480 U.S. 149 (1987). It held that the Law School appropriately considered race-neutral alternatives, and that the Law School in fact has no viable race-neutral alternatives at this time that would allow it to achieve its legitimate educational goals. Pet. App. 33a-36a. The Sixth Circuit acknowledged the record evidence demonstrating that admissions by race-blind "lottery" could not, in light of the Law School's applicant pool, produce meaningful diversity. *Id.* at 34a. And it held that this Court's decisions did not require the Law School to "choose between meaningful racial and ethnic diversity and academic selectivity," or "abandon its academic mission to achieve absolute racial and ethnic neutrality." *Id.* at 35a. The Sixth Circuit also held that the

Law School's particular attention to African-American, Native-American and Hispanic applicants was founded on a reasonable educational judgment, and that its policy has appropriate durational limits because the Law School "intends to consider race and ethnicity to achieve a diverse and robust student body only until it becomes possible to enroll a 'critical mass' of underrepresented minority students through race-neutral means." *Id.* at 37a-38a.

Judge Clay wrote separately to emphasize the strength of the evidentiary record introduced by respondents concerning the educational benefits of diversity, and to respond to what he described as certain misrepresentations in Judge Boggs's dissenting opinion. *Id.* at 51a-83a.

Judge Boggs, joined by three other judges, dissented. Judge Boggs concluded that Justice Powell's opinion in *Bakke* was merely "the advisory opinion of one Justice" (*id.* at 115a), and that a "compelling interest" in educational diversity should not be recognized on the merits (*id.* at 115a-129a). Judge Boggs also concluded that the Law School's policy was not narrowly tailored because the "plus" given to racial minorities in practice was "just too large." *Id.* at 130a. He asserted, for example, that race is pervasively "worth over one full grade point of college average." *Id.* at 132a.[9] He also reasoned that the Law School was operating a secret quota because the percentage of minorities in the entering class was very consistent between 1995 and 1998. *Id.* at 141a-142a. (Judge Boggs acknowledged, however, that the variation was considerably greater outside of that narrow window. *Id.* at 142a n.29.) He further reasoned that the Law School should seek to assemble a class that is diverse in experiences and viewpoints, but not racial or ethnic background. *Id.* at 152a-155a. (In this context Judge Boggs questioned whether "an experience with [racial]

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[9] As previously noted, the actual disparity is slightly less than 1/3 of a grade point, or the difference between a B+ and an A- average.

discrimination" was really "so much more important than any other experience germane to other legal issues." *Id.* at 120a.) Finally, Judge Boggs suggested that the Law School could assemble a class that is as racially and ethnically diverse "as the qualified applicant pool itself" by conducting "a lottery for all students above certain threshold figures for their GPA and LSAT." *Id.* at 156a.

REASONS FOR DENYING THE WRIT

More than twenty years ago, this Court resolved a bitter national controversy over the constitutionality of race-conscious admissions policies in its landmark decision in *Bakke*. The essential holding of *Bakke* is that quotas or other dual track admissions systems are illegal, but that some attention may be paid to race in the context of a competitive review of the ways that each applicant will contribute to the overall diversity of the student body.

As the Sixth Circuit properly held, the Law School's admissions practices are "virtually indistinguishable" from the Harvard College policy specifically endorsed by five Justices in *Bakke*. Pet. App. 29a. Petitioners therefore cannot prevail in this litigation unless the square holding of *Bakke* is overruled. The petition offers this Court no persuasive justification for making such a radical and disruptive break with settled precedent. *Bakke* has been relied upon by universities and public officials for decades, and has become an important part of our national culture. And petitioners do not even challenge its underlying rationale—that there are important educational benefits associated with learning in a diverse, racially integrated environment. In the face of overwhelming educational and social science evidence presented by the Law School, they conceded that point in the district court.[10]

[10] *See* Pet. App. 246a ("The court does not doubt that racial diversity in the law school population may provide these educational and societal benefits. Nor are these benefits disputed by the plaintiffs in this case. Clearly the benefits are important and laudable.").

The petition's assertion that there is now "sharp and substantial disagreement in the lower courts about the lawfulness of using race and ethnicity as a factor in admissions to achieve a 'diverse' student body" (Pet. 16) is simply wrong. Only one court of appeals decision has stated that a university's interest in assembling a diverse student body can never justify the consideration of race in admissions. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). That decision has been sharply criticized even within the Fifth Circuit,[11] and has gained no adherents elsewhere. Since this Court denied certiorari in *Hopwood*, the Ninth Circuit and now the Sixth have reaffirmed that *Bakke* remains the law. *See Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001). The Eleventh Circuit suggested that it does not believe *Bakke* is controlling, but then expressly declined to resolve whether diversity is or is not a "compelling interest." *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1251 (11th Cir. 2001). Several other circuits have withheld judgment, awaiting a case that requires them to resolve these issues. *See* Pet. 23-24. The "disagreement" identified by the petition thus remains quite shallow and undeveloped.

The petition also implies, but stops short of squarely alleging, a conflict over narrow tailoring principles. *Id.* at 17, 24-25. None exists. Only two courts of appeals have considered whether a higher education admissions program

[11] *See Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996) (Politz, C.J., joined by King, Wiener, Benavides, Stewart, Parker and Dennis, JJ., dissenting from failure to grant *sua sponte* rehearing *en banc*); *Hopwood v. Texas*, 236 F.3d 256, 274 (5th Cir. 2000) ("This or other subsequent panels of our court may well disagree with the aggressive legal reasoning employed by the *Hopwood II* panel ...."), *cert. denied*, 533 U.S. 929 (2001).

is narrowly tailored, and both applied the same legal standards to very different facts.

This case undeniably touches upon issues of national importance. But that simply underlines the wisdom of adhering to this Court's traditional reluctance to decide difficult questions before they have been adequately aired in the lower courts. This Court should consider revisiting *Bakke* only with the guidance and experience of the courts of appeals in a variety of concrete factual settings—and only if a plaintiff is able to develop and present a meaningful challenge to the educational and social science evidence underlying that decision.

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

A. The Sixth Circuit Correctly Held That The Law School's Policy Is Constitutional Under The Essential Holding of *Bakke*

This Court announced two separate judgments in *Bakke*: that the UC Davis Medical School's rigid 16% quota for racial minorities was illegal, and that the California Supreme Court's prospective injunction prohibiting all future consideration of race in admissions was overbroad and must be reversed. With respect to the latter judgment, five Justices squarely held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 320 (1978). That was true even though it was "conceded that [the University] had no history of discrimination," *id.* at 296 n.36 (Powell, J.), and articulated no narrowly remedial justification for considering race.

The Justices composing that majority were not, however, entirely in agreement as to what constitutes a

"properly devised" race-conscious admissions program. Justice Powell believed that the intellectual pluralism promoted by diversity is "of paramount importance" to a university's institutional mission (*id.* at 313), to the academic freedom that the Court has long considered a "'special concern of the First Amendment'" (*id.* at 311-12) (citation omitted), and to the interests of the wider society. He concluded that universities could pay some attention to race in the context of a flexible, individualized review of the ways that each applicant would contribute to the creation of a vibrant and diverse student body—but could not employ quotas or set-asides, which in his view did not suggest a concern for educational diversity broadly, but instead pointed to an improper and singular focus on race. *Id.* at 311-19. He also identified the admissions policy of Harvard College as an example of a properly devised program, under which race was considered as one of many factors in order to achieve the benefits of a broadly diverse student body, and appended a copy of that policy to his opinion. *Id.* at 316-18, 321-24.

Justice Brennan, joined by Justices White, Marshall and Blackmun, concluded that past and present societal discrimination against racial minorities justified much wider and stronger consideration of race in admissions than Justice Powell and the "Harvard plan" would permit. Those Justices nonetheless explicitly "agree[d] with Mr. Justice Powell that a plan like the 'Harvard' plan is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." *Id.* at 326 n.1 (Brennan, J., concurring in part, dissenting in part) (citation omitted). In the context of their opinion, the caveat in the last clause (which pointedly uses the phrase "necessitated by" rather than "justified by") simply means that consideration of race in admissions should cease once the disparities in applicants' numerical qualifications produced

by our nation's discriminatory past have been eliminated, and a racially diverse class may be assembled by other means.[12]

The minimum, essential holding endorsed by five Justices in *Bakke* is therefore that an institution of higher education may consider the racial or ethnic background of applicants in its admissions process, even if it has no historical discrimination of its own to remedy, at least in the manner exemplified by the "Harvard plan" appended to Justice Powell's opinion. *Id.* at 321-23 (Powell, J.), 326 n.1 (Brennan, J., concurring in part, dissenting in part). That observation requires no sophisticated analysis, and is alone sufficient to support the Sixth Circuit's holding in this case (reversing an injunction materially identical to the one this Court reversed in *Bakke*)—since that court found that the Law School's admissions policy is "virtually indistinguishable" from the Harvard plan. Pet. App. 29a.

Although no further analysis is essential to the result here, Justice Powell's reasoning is also plainly the "narrowest ground" articulated by any Justice supporting the reversal of the California Supreme Court's injunction, and is therefore a holding of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977). The other Justices forming that majority believed that the Constitution permits much more extensive consideration of race in admissions than Justice Powell did; indeed, they even voted to uphold the rigid 16% quota employed by UC Davis.[13] At

[12] The Law School's policy incorporates the same limitation, but that day has not yet arrived. *See* Pet. App. 33a-36a, 38a; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality . . . .").

[13] Stated differently, those Justices had much broader reasons for reversing the injunction because they believed that it improperly foreclosed a much wider spectrum of legal conduct than Justice Powell did. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 496-97 (1989)

the same time, however, they clearly regarded Justice Powell's analysis as compatible with (if stingier than) their own. They explicitly endorsed the Harvard plan, for example, even though that plan was solely focused on and tailored toward the achievement of diversity rather than compensating for past societal discrimination. Justice Powell's conclusion that achieving the educational benefits of diversity is a "compelling interest" under strict scrutiny is therefore a holding of this Court under *Marks*.

B. This Court Has Repeatedly Acknowledged The Essential Holding Of *Bakke*, And Has Never Questioned Its Continuing Validity

This Court has never questioned the essential holding of *Bakke*, and indeed has uniformly assumed its continuing validity. Justice O'Connor wrote in *Wygant* that this Court's fractured affirmative action opinions nonetheless revealed "a fair measure of consensus," including that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part); *see also id.* at 288 n.* (recognizing distinction between providing role models and "the very different goal of promoting racial diversity among the faculty"). And in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990), this Court cited *Bakke*, 438 U.S. at 311-13, for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." The standard of review applied in *Metro Broadcasting* was, of course, subsequently

(noting that Justice Powell's opinion in *Bakke* would permit the consideration of race only to pursue more narrowly "focused" objectives, not the "amorphous" goal of remedying societal discrimination).

overruled in favor of strict scrutiny, *Adarand*, 515 U.S. at 227, but this Court simultaneously acknowledged that Justice Powell had in fact applied strict scrutiny in *Bakke*, *id.* at 218-19.

Dicta in various opinions in *Adarand* and *Croson* have suggested that remedying the effects of prior discrimination may be the only "compelling interest" justifying affirmative action in highway contract awards. But this Court has never questioned *Bakke*'s holding that the educational benefits of diversity can justify some consideration of race in the very different context of higher education. *See Adarand*, 515 U.S. at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case . . . .").

II. THE PETITION FORWARDS NO PERSUASIVE ARGUMENT FOR GRANTING REVIEW IN ORDER TO OVERRULE THE ESSENTIAL HOLDING OF *BAKKE*

This Court recognized long before *Bakke* that preparing students for work and citizenship in our diverse society is difficult, if not impossible, in racially homogenous classrooms and on racially segregated campuses. In *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), this Court held that Heman Sweatt could not receive an equal legal education at a law school which "excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing." "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts." *Id.* This Court has acknowledged the educational benefits of a diverse student body repeatedly since then. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95

& n.11 (1954); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982) ("[I]t should be equally clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'") (citation omitted); *Bakke*, 438 U.S. at 311-23 (Powell, J.).

This Court's longstanding conviction that diversity has important educational benefits is backed by a remarkably uniform and non-ideological consensus among educators, social scientists and policymakers. Respondents introduced such voluminous and compelling evidence of those benefits in the district court that petitioner chose not to contest the point. *See supra* pp. 12-13 & n.10. The United States filed an *amicus curiae* brief summarizing some of the educational and social science evidence, and concluded that diversity "in the higher education context improves students' education, racial understanding, cultural awareness, cognitive development and leadership skills." JA 786. Congress has also repeatedly recognized the educational value of racially diverse classrooms, enacting a series of measures over more than three decades to reduce "racial isolation" in elementary and secondary schools nationwide.[14] The evidence of these benefits, at all levels of the educational process, is well known and overwhelming.

These issues are particularly easy to understand in the context of legal education. At this point in our nation's history, race is very salient to the day-to-day operation of

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[14] *See* Emergency School Aid Act, Pub. L. No. 92-318, §§ 701-720, 86 Stat. 354 (1972); Magnet Schools Assistance Program, Pub. L. No. 98-377, § 703, 98 Stat. 1299 (1984); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425. The legislative history of these provisions reveals Congress's firm belief that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both" white and minority students. S. Rep. No. 92-61, at 7 (1971). The just-enacted No Child Left Behind Act reaffirmed that "[i]t is in the best interests of the United States . . . to continue the Federal Government's support of . . . local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds . . . ." Pub. L. No. 107-110, § 5301(a)(4)(A), 115 Stat. at 1806 (codified at 20 U.S.C. § 7231).

our legal system. Indeed, monitoring and mediating the progress of our country's ongoing struggle to achieve racial justice has become one of the most important jobs of the federal courts. Discrimination suits under Titles VI, VII and IX, ongoing school desegregation cases, Voting Rights Act enforcement and racial-profiling lawsuits have all become staples of the judiciary's case load. The disparate impact of the criminal justice system in general, and certain criminal statutes in particular, on racial minorities is one of the most oft-debated and important challenges that our society faces. Against this backdrop, law schools surely must have the autonomy and discretion to decide that teaching about the role of race in our society, and preparing their students to function effectively in multiracial environments and as advocates for racial justice (however defined) after graduation, are critically important aspects of their institutional missions. And once that decision is made, it hardly requires extensive proof (although proof there is, and abundant) that meaningful pursuit of those goals is greatly enhanced by the presence of meaningful diversity among the law school's student body.

This Court has also recognized several times in recent years that *stare decisis* has particular force when a decision has become woven into the fabric of our "national culture," *Dickerson v. United States*, 530 U.S. 428, 443 (2000), and has "engendered substantial reliance." *Adarand*, 515 U.S. at 233 (O'Connor, J.); *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992); *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (stating that the fact that a rule has found "wide acceptance in the legal culture" is "adequate reason not to overrule" it). *Bakke* falls squarely into that category, and overruling it now would be enormously disruptive. Over the past two and a half decades, nearly every selective university and professional school in the United States has relied on *Bakke* in crafting admissions and financial aid policies that seek to secure the

educational benefits of a diverse student body. And they have been supported by binding regulations and policy guidance statements from the Department of Education, the agency charged with enforcing Title VI, consistently affirming (under both Republican and Democratic administrations) that admissions and financial aid policies that consider race in a manner consistent with Justice Powell's opinion and the Harvard plan are constitutional. *See, e.g.*, 34 C.F.R. § 100.3(b)(6)(ii); 44 Fed. Reg. 58,509 (Oct. 10, 1979); 56 Fed. Reg. 64,548 (Dec. 10, 1991); 59 Fed. Reg. 8756 (Feb. 23, 1994).

Most importantly, overruling *Bakke* would produce the immediate resegregation of many—and perhaps most—of this Nation's finest and most selective institutions.[15] A blanket prohibition on the consideration of race in admissions for diversity purposes would cut the representation of African-American students at selective universities by more than two-thirds, and at accredited law schools by more than three-fourths. JA 811-12; *see also id.* at 5589-96, 6047 (Raudenbush). In the year after the Fifth Circuit prohibited the University of Texas Law School from considering race in its admissions process, Hispanic admissions fell by 51% and African-American student admissions fell by 83%—to *four*, out of a class of about 500.[16] The University of California at Berkeley's Boalt Hall School of Law and UCLA School of Law experienced similar drops after affirmative action was eliminated by the Regents and then by voter initiative in California. JA 5102-03, 5123.[17] It

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[15] That includes private institutions because this Court has held that the scope of Title VI is coextensive with the Equal Protection Clause.

[16] *See* Stephanie E. Straub, Note, *The Wisdom and Constitutionality of Race-Based Decision-Making in Higher Education Admission Programs: A Critical Look at Hopwood v. Texas*, 48 Case W. Res. L. Rev. 133 (1997).

[17] *See generally* Andrea Guerrero, *Silence at Boalt Hall: The Dismantling of Affirmative Action* (Univ. of Cal. Press 2002). Texas and

should be obvious that, as our country becomes increasingly racially diverse, the public confidence in law enforcement and legal institutions so essential to the coherence and stability of our society will be difficult to maintain if the segments of the bench and bar currently filled by graduates of those elite institutions once again become a preserve for white graduates.

Petitioner's broader contention that remedying the effects of past discrimination is the only possible "compelling interest" would have even wider negative ramifications. Public officials simply must be permitted to take race into account when choosing an undercover law enforcement officer to infiltrate a racially homogenous terrorist cell, for example, or when acting to quell a race riot in a prison. A number of lower courts have recognized compelling public safety interests in situations like these, *see Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (Posner, C.J.)

California have regarded those outcomes as so destructive to the educational missions of their undergraduate institutions that they have chosen to guarantee admission for students above a specified class rank threshold in every high school in the State in order to prevent radical resegregation. While that is a legitimate choice that States should be entitled to make through their democratic and educational decision-making processes, it is hardly a panacea and can have serious drawbacks even for public undergraduate schools. Such plans rely on segregation at the secondary school level to produce integration in higher education, *see* Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 Ohio St. L.J. 1729 (2001), and therefore will not work in many areas of the country with different demographic patterns. They may also force the enrollment of students who are unprepared for the academic demands of selective institutions. There was evidence in this case, for example, that the University of Chicago "routinely rejects valedictorians from Chicago high schools ... because of the experience that they could not survive for a single quarter on the campus." JA 7882-83. In any event, such plans cannot solve the problem at the graduate level or at private institutions because they draw from a national applicant pool. The record in this case clearly establishes that there are no race-neutral alternatives capable of producing meaningful diversity at the Law School. *Supra* pp. 8-9 & n.8, 21-22.

(collecting cases), and this Court should be reluctant to embrace a rigid and abstract interpretation of the Equal Protection Clause that would prejudge such situations. *See also, e.g., Hunter ex rel. Brandt v. Regents of Univ. of California*, 971 F. Supp. 1316 (C.D. Cal. 1997), *aff'd*, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000).

III. THE PETITION IDENTIFIES NO CONFLICT IN THE LOWER COURTS THAT IS APPROPRIATE FOR REVIEW

A. Review Is Not Appropriate On The Narrow Question Of The Proper Application Of *Marks*

The petition alleges a 2-2 split among the federal courts of appeals over whether the "narrowest ground" methodology outlined in *Marks* produces a binding holding from this Court's various opinions in *Bakke*. To begin with, even the shallow conflict alleged by the petition is substantially overstated. Two courts of appeals—the Sixth Circuit in this case and the Ninth in *Smith*—have applied the *Marks* analysis to *Bakke* and have squarely held that Justice Powell's opinion states a holding of the Court. But the two decisions supposedly reaching a contrary conclusion are in fact quite murky.

The Fifth Circuit did hold in *Hopwood* that Justice Powell's opinion in *Bakke* was not entitled to precedential status, but its opinion never once mentions *Marks*. The Fifth Circuit instead seemed to believe that an opinion signed by only one Justice could never state a holding of this Court, and that this Court's more recent decisions in *Croson* and *Adarand* hold that remedying past discrimination is the only possible "compelling interest." *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). Both of those propositions are clear error. Seven Fifth Circuit judges voted for a *sua sponte* rehearing *en banc* in *Hopwood*, and wrote a passionate dissent arguing that rehearing was not merely advisable but obligatory.

Hopwood v. Texas, 84 F.3d 720, 721-24 (5th Cir. 1996) (Politz, C.J. et al., dissenting from denial of rehearing *en banc*). When the issue arises again,[18] the Fifth Circuit may well correct its errors without any need for this Court's intervention.

In *Johnson*, the Eleventh Circuit discussed the application of *Marks* to *Bakke* and appeared to conclude that Justice Powell's opinion does not state a holding of the Court. *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1247-50 (11th Cir. 2001). But the Eleventh Circuit later stressed that it was reserving decision on the merits question of "whether or when student body diversity may be a compelling interest for purposes of strict scrutiny," *id.* at 1251, and rested its judgment solely on narrow tailoring grounds. The Eleventh Circuit's discussion of the *Marks* issue thus appears to be unnecessary and irrelevant to its judgment. And even if later panels do treat *Johnson*'s discussion of *Marks* as a binding analysis of the *Bakke* judgment, it may prove to be an irrelevant detour if the Eleventh Circuit ultimately concludes that Justice Powell was right on the merits.

In any event, the *Marks* conflict would not be certworthy even if it were not so ephemeral. First, it involves the proper technical application of settled law in a particular context. It is not of substantial importance except to the extent that it has implications for the merits of whether educational diversity qualifies as a "compelling interest." Second, the *Marks* issue is not even necessary to the outcome of this case. Because the Sixth Circuit held that the Law School's admissions policy is indistinguishable from the "Harvard plan" explicitly approved by five Justices in *Bakke*, it is not necessary to decide whether Justice

[18] It is highly likely that a challenge to *Hopwood* will arise in one of a variety of contexts because the rationale of that decision was that *Croson* and *Adarand* prohibit consideration of race for *any* non-remedial purpose.

Powell's *rationale* for endorsing the Harvard plan also qualifies as a holding of the Court under *Marks* (although the answer is surely yes).

B. Review Of Whether The Educational Benefits Of Diversity Constitute A "Compelling Interest" Would Be Premature

This Court should not grant review in this case to reconsider, on the merits, whether the educational benefits of diversity constitute a "compelling interest" under strict scrutiny. Petitioner is certainly right to portray this question as a matter of national importance. But for that reason this Court should reopen it—if it ultimately chooses to do so—only after the issue has been adequately developed through litigation in the lower courts.

There is as of yet no meaningful conflict on this issue. *Hopwood* remains the only decision of any court of appeals even nominally to reach the question whether the educational benefits of diversity are "compelling" enough to justify race-conscious action. And even *Hopwood* did not actually engage the relevant educational evidence and competing constitutional values; it simply relied on a misreading of this Court's opinion in *Croson* to conclude that non-remedial compelling interests are non-existent as a matter of law. The only new development since this Court denied certiorari in *Hopwood* is that two courts of appeals (again, the Sixth and the Ninth) have held that they do not need to reach this question because it is resolved by *Bakke*. The diversity issue has received virtually no consideration on the merits in the lower courts, and further development would be beneficial to this Court's ultimate consideration.[19]

[19] Future courts may similarly decline to reach the merits of this issue on the ground that it is resolved by *Bakke*, but it seems quite likely that some courts will address the merits—at least in the alternative. *See, e.g.*, Pet. App. 115a-129a (Boggs, J., dissenting). And even if the courts of appeals do ultimately refrain from evaluating the evidence of diversity's educational benefits *en masse*, this Court can decide at that time whether

That principle has special force here because the record in this case could not support the result petitioner advocates. As her filing in this Court illustrates, petitioner has relied throughout this litigation on the legal theory that a "compelling interest" in diversity (indeed, a compelling interest in *anything* other than remedying past discrimination) is simply non-existent as a matter of law after *Croson* and *Adarand*. Petitioner elected not to contest the Law School's extensive evidence concerning the educational benefits of diversity, introduced virtually no evidence questioning the magnitude of those benefits, and indeed conceded in the district court that the benefits are extensive and important. That tactic is hardly surprising because the evidence of those benefits is overwhelming and essentially uncontested within the educational community. This Court should revisit *Bakke*'s determination that diversity has compelling educational benefits only after someone has been able to construct a plausible case against Justice Powell's position in the lower courts. At a minimum, it would make little sense for this Court to revisit that issue in a case where the petitioner has conceded the point.

C. The Sixth Circuit's Narrow Tailoring Analysis Involves The Factbound Application Of Settled Law And Does Not Conflict With The Decision Of Any Other Circuit

The petition vaguely suggests that the Sixth Circuit's narrow tailoring analysis "diverges" from that of other courts, but does not (and cannot) contend that these issues would have been resolved differently under the precedents of any other Circuit. The Sixth Circuit's articulation of the relevant narrow tailoring standards is correct and consistent with the legal rules announced in the other cases she cites. The "divergence" petitioner identifies simply

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to reconsider the issue without the benefit of their assistance. There is no reason to make that decision now.

reflects the factbound application of settled, properly stated legal rules in different settings.

The Sixth Circuit's narrow tailoring analysis concerning the size of the "plus" given to racial or ethnic background does not conflict with the Eleventh Circuit's opinion in *Johnson*. Pet. 24. *Johnson* acknowledged that an admissions policy, like the Law School's, which gives flexible, individualized consideration to the ways (both racial and non-racial) that every applicant might contribute to "the overall diversity of the student body" would be narrowly tailored. 263 F.3d at 1253-54. *Johnson* condemned the University of Georgia's program for awarding a completely *arbitrary* numerical "bonus" on purely racial grounds, at a stage in the admissions process where admissions files were not read in their entirety and admissions officers were not permitted to give similar consideration to any non-racial diversity considerations. *Id.* at 1254-57. The Eleventh Circuit stressed that Georgia's system was a "far cry from the Harvard plan." *Id.* at 1261.

Similarly, the Sixth Circuit's scrutiny of whether the Law School's policy was the "functional equivalent of a quota" does not conflict with *Tuttle ex rel. Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000). The program invalidated in *Tuttle* did not seek to obtain the educational benefits of diversity, but rather was motivated by a desire for simple racial proportionalism, and used a lottery that was numerically weighted by race (and race alone) to achieve outright racial balancing. *Id.* at 707. As the Fourth Circuit properly recognized, that program was both philosophically and mathematically indistinguishable from the naked quota employed by UC Davis in *Bakke*.

The petition suggests that the Law School's "focus[]" on a "small and limited number of racial groups" has "proved inconsistent with narrow tailoring in other cases." Pet. 25.

To the extent the cited cases address this issue at all, they suggest that race-conscious action is not narrowly tailored if the groups that benefit appear to be defined arbitrarily or in a manner that does not appear to further the genuine pursuit of broad-based diversity. This Court criticized the contracting set-asides in *Croson*, for example, because they were available to *too many* racial groups—including some (notably Eskimos) that bore no plausible relation to Richmond's stated objectives.

As the Sixth Circuit properly held, the Law School's special commitment to enrolling African Americans, Native Americans and Hispanics rests on the considered educational judgment that students from these groups are particularly likely to have had experiences of special importance to its educational mission, and would not, without some attention to race in admissions, be present in significant numbers. Pet. App. 37a. The Law School recognizes that there are other groups of people likely to have had unique experiences in this society precisely because of their ethnic background, such as Asian and Jewish Americans. Insofar as such an applicant's unique experience suggests that the applicant would contribute meaningfully to the diversity and life of the Law School, the Law School's admissions policy expressly provides that these "diversity enhancing" experiences be considered in the admissions process. While the Law School does not make special effort at the admissions stage to enroll "meaningful numbers" or a "critical mass" of members of these groups in the law school class, that is only because "members of those groups are already being admitted to the law school in significant numbers" on race-neutral criteria. *Id.* at 213a n.15. These are precisely the kind of careful judgments that the cited cases call for.

The Sixth Circuit's scrutiny of the duration of the Law School's program was also not "much less rigorous" than

that employed in *Tuttle* and *Johnson*. The *Tuttle* defendants articulated no "logical stopping point" for their race-weighted lottery at all, 195 F.3d at 706, and the Fourth Circuit determined that the goal of the program was racial balancing—not diversity. In *Johnson* there was similarly "no evidence that UGA envisions an end to its practice." 263 F.3d at 1261. In any event, the Eleventh Circuit stated that it did "not believe that this factor should have a great deal of significance" in the diversity context. *Id.* The Sixth Circuit held that the Law School's policy has appropriate durational limits because it will cease considering race as soon as it becomes possible to assemble a critical mass of minority students through race-neutral means. Pet. App. 38a. That holding is reasonable and does not conflict with *Tuttle* or *Johnson*.

Finally, it would be inappropriate and premature for this Court to grant review in order to answer the laundry list of narrow tailoring questions that petitioner believes "cry out for clarification." Pet. 17. Petitioner does not even allege a conflict on these matters—and cannot, because the courts of appeals have thus far analyzed only two higher education admissions programs. Questions like these should be "clarified" through the litigation of concrete factual situations in the lower courts.

D. The Sixth Circuit's *De Novo* Review Of Various Ultimate Legal Conclusions And Constitutional Mixed Questions Was Consistent With Settled Law, And Petitioner Identifies No Conflict That Could Justify Review By This Court

Petitioner's conclusory assertion that the Sixth Circuit improperly reviewed certain factual findings *de novo* alleges no conflict with the decisions of this Court or any other court, and does not even identify the factual findings that she believes were treated improperly. This Court should

accordingly decline to review this matter even if it reviews other issues in the case.

The issue also has no merit. The matters on which the Sixth Circuit disagreed with the district court were legal conclusions or characterizations, not historical facts. *See* Pet. App. 9a ("This Court reviews *de novo* the district court's finding that the Law School's efforts to achieve a diverse student body ... is unconstitutional ...."). Petitioner inadvertently admits as much; for example, while she initially implies that whether the Law School's policy is the "functional equivalent of a quota" is a factual finding deserving clear error treatment (Pet. 13), she later makes it clear that she views this question as an unsettled legal issue that this Court should grant certiorari to clarify (*id.* at 17). The Sixth Circuit's *de novo* review of these issues is also consistent with other Circuits. *See, e.g., Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) ("[B]ecause the issues advanced in this appeal—specifically, whether diversity and curing vestiges of past discrimination satisfy strict scrutiny—raise either questions of law or questions about how the law applies to discerned facts, our review is essentially plenary.").

CONCLUSION

For the reasons stated, the petition should be denied. If this Court nevertheless decides to grant review in this case, respondents agree that it would be appropriate to grant the petition for certiorari before judgment filed in the undergraduate case, *Gratz v. Bollinger*, No. 02-516, and hear both cases on the same day, for the reasons explained in our response in *Gratz*.[20]

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[20] There is no conceivable justification for granting certiorari before judgment in *Gratz* unless the Court grants the writ in this case. If this Court grants the petition in *Gratz* for any reason, however, respondents believe that the Court should also accept this case and hear the two on the same day for the reasons explained in our response in *Gratz*.

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Respectfully submitted,

MARVIN KRISLOV
JONATHAN ALGER
UNIVERSITY OF MICHIGAN
Office of the Vice President
and General Counsel
4010 Fleming Admin. Bldg.
503 Thompson St.
Ann Arbor, MI 48109

EVAN CAMINKER
UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, MI 48109

PHILIP J. KESSLER
LEONARD M. NIEHOFF
BUTZEL LONG
350 South Main, Suite 300
Ann Arbor, MI 48104

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
LATHAM & WATKINS
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

JOHN H. PICKERING
JOHN PAYTON
BRIGIDA BENITEZ
STUART DELERY
CRAIG GOLDBLATT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037

Counsel for Respondents